No. 09-270

In the Supreme Court of the United States

MICHAEL BURNELL MARLEY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Under the Federal Tort Claims Act, a person seeking to file a tort action against the United States must file his complaint in district court "within six months after the date of mailing, by certified or registered mail, of notice of final denial of the claim" by the relevant agency. 28 U.S.C. 2401(b). The question presented is whether the six-month deadline prescribed by 28 U.S.C. 2401(b) for filing a complaint in district court is subject to equitable tolling.

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OPINIONS BELOW

The amended opinion of the court of appeals (Pet. App. 1-18) is reported at 567 F.3d 1030. The initial opinion of the court of appeals (Pet. App. 19-34) is reported at 548 F.3d 1286. The order of the district court granting the government's motion to dismiss (Pet. App. 35-44), and its order granting the government's motion for partial reconsideration (Pet. App. 46-48), are unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 8, 2008, and amended on June 1, 2009. A petition for rehearing was denied on June 1, 2009 (Pet. App. 1-2). The petition for a writ of certiorari was filed on

August 31, 2009 (Monday). The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Tort Claims Act (FTCA) waives the federal government's immunity to suit by individuals "for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment." 28 U.S.C. 1346(b). Under the FTCA, any tort claim against the United States is "forever barred unless it is presented in writing to the appropriate Federal agency within two years after such claim accrues or unless action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b).

2. Petitioner was treated for prostate cancer by doctors of the Department of Veterans Affairs (VA) at the Puget Sound Healthcare System Hospital. He alleged that he experienced complications resulting in physical injury. Pet. App. 3. In February 2004, he timely filed an administrative claim with the VA. On October 22, 2004, the VA sent petitioner notice of final denial of his tort claim. *Ibid.* The notice informed petitioner's lawyer that any court action "'must be initiated within 6 months after the date of the mailing of this notice of final denial as shown by the date of this letter.'" *Id.* at 3-4.

On March 3, 2005, within the requisite six-month period, petitioner filed a complaint in the district court seeking damages against the United States. Pet. App. 4, 36. Petitioner's lawyers subsequently moved for leave to withdraw from representing him, and the district court granted the motion on January 3, 2006. The dis-

trict court gave petitioner "'notice that he [was] responsible for pursuing [the] action in accordance with the Order Setting Trial Date and Related Dates.'" *Ibid.* (brackets in original).

On January 27, 2006, an Assistant United States Attorney (AUSA) sent a letter to petitioner, stating in part:

> I was told by the staff in our Tacoma office that you might be interested in dismissing your case. In case that's still true, I've taken the liberty of drafting a "Stipulation" (enclosed) that would do that. If you're not familiar with the legal terms involved, and in case you don't want to consult another lawyer (which is entirely your right), I'll briefly state my opinion as to what they mean.
>
> . . . This stipulation provides that your case would be dismissed "without prejudice." That means you could (in theory) bring it again at a later date. The other option would be dismissing "with prejudice," which would mean you could not bring it again. But please be aware that even if you dismiss now "without prejudice," there may be other factors, such as statutes of limitations, that could limit or bar your ability to bring this case again.

Pet. App. 4-5. The AUSA later sent a follow-up letter, which noted approaching deadlines in the case, including an April 10, 2006 deadline for disclosing expert witnesses. *Id.* at 5, 36-37. Petitioner signed the stipulation and returned it to the AUSA. *Id.* at 5. The stipulation and a Proposed Order dismissing the action were filed with the district court, and the court dismissed the action without prejudice on February 27, 2006. *Ibid.*

3. On March 15, 2006, petitioner filed a complaint essentially identical to his first one. Pet. App. 6. The United States filed an answer and moved to dismiss on the ground that the complaint was out of time under Section 2401(b) because it was filed more than six months after the denial of petitioner's administrative claim on October 22, 2004. *Ibid.*; see *id.* at 4. Petitioner did not dispute that his complaint was out of time, but argued, *inter alia*, that the statute of limitations should be equitably tolled because he would not have dismissed his first action had he realized that a refiled action would be untimely. *Id.* at 39; see Pet. 6.

The district court granted the government's motion. Pet. App. 35-44. The court held that petitioner was not entitled to tolling of the statute of the limitations because, though he was presumed to be aware of the six-month statute of limitations, he voluntarily dismissed his first, timely action "for strategic reasons, to gain additional time to locate an expert." *Id.* at 43-44.

The court of appeals affirmed on the ground that the FTCA's six-month statute of limitations is jurisdictional and therefore not subject to equitable tolling. Pet. App. 1-18. Although the court found support for its conclusion in its own precedents, *id.* at 11-13, it principally relied on this Court's decision in *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750 (2008), which held that a similar statute of limitations provision in 28 U.S.C. 2501 is jurisdictional in nature. The court of appeals held that Section 2401's six-month filing deadline, like the one in Section 2501, falls into the category of those "more absolute" statutes of limitations whose purpose is "not so much to protect [the government's] case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administra-

tion of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." Pet. App. 9-10 (quoting *John R. Sand & Gravel*, 128 S. Ct. at 753); accord *id.* at 13. Such statutes, the court noted, are generally read to "forbid[] a court to consider whether certain equitable considerations warrant extending a limitations period." *Id.* at 10 (quoting *John R. Sand & Gravel*, 128 S. Ct. at 753).

The court of appeals also noted that the structure of 28 U.S.C. 2401 as a whole provides further indication that equitable exceptions do not apply to the six-month limitations period in Section 2401(b). Pet. App. 14-15. In the general statute of limitations provision for suits against the United States, 28 U.S.C. 2401(a), Congress specified that a civil action against the United States "shall be barred" unless the complaint is filed "within six years after the right of action first accrues," but the action of any person "under legal disability or beyond the seas at the time the claim accrues may be commenced within three years after the disability ceases." The court of appeals concluded that, "[b]ecause Congress chose to extend the time limit in § 2401(a) under certain circumstances, but did not include *any* exceptions to the limitations period of § 2401(b), we must conclude that Congress intended the deadlines of § 2401(b) to be adhered to strictly." Pet. App. 15.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. In *Irwin* v. *Department of Veterans Affairs*, 498 U.S. 89 (1990), the Court held that "the same rebuttable presumption of equitable tolling applicable to suits

against private defendants should also apply to suits against the United States." *Id.* at 95-96; see also *United States* v. *Brockamp*, 519 U.S. 347, 350, 354 (1997) (explaining that equitable tolling is generally available in suits against the government unless there is "good reason to believe that Congress did *not* want the equitable tolling doctrine to apply," and concluding that Congress would not have intended to permit equitable tolling of the limitations period for filing tax refund claims in 26 U.S.C. 6511).

In its recent decision in *John R. Sand & Gravel*, this Court clarified its prior cases concerning the availability of equitable tolling in suits against the United States. The Court explained that "[m]ost statutes of limitations seek primarily to protect defendants against stale or unduly delayed claims," and "typically permit courts to toll the limitations period in light of special equitable considerations." *John R. Sand & Gravel*, 128 S. Ct. at 753. On the other hand, the Court explained, some statutes of limitations "seek not so much to protect a defendant's case-specific interest in timeliness as to achieve a broader system-related goal, such as facilitating the administration of claims, limiting the scope of a governmental waiver of sovereign immunity, or promoting judicial efficiency." *Ibid.* (citations omitted). The Court has often read the time limits of such statutes "as more absolute, say as requiring a court to decide a timeliness question despite a waiver, or as forbidding a court to consider whether certain equitable considerations warrant extending a limitations period." *Ibid.* The Court has typically referred to the time limits in such statutes as "jurisdictional." *Ibid.* Consistent with its precedent, the Court in *John R. Sand & Gravel* concluded that the statute of limitations for filing claims in the United

States Court of Federal Claims, 28 U.S.C. 2501, is "jurisdictional." *John R. Sand & Gravel*, 128 S. Ct. at 753-757; see 28 U.S.C. 2501 ("Every claim of which the United States Court of Federal Claims has jurisdiction shall be barred unless the petition thereon is filed within six years after such claim first accrues.").

2. Applying this Court's cases, the court below correctly held that the FTCA's six-month limitations period for filing a tort claim against the United States in federal court, following notice of the administrative denial of the claim, is jurisdictional and therefore not subject to equitable tolling.

As an initial matter, Section 2401(b) states that a tort claim against the United States "shall be *forever barred*" unless "action is begun within six months after the date of mailing * * * of notice of final denial of the claim by the agency to which it was presented." 28 U.S.C. 2401(b) (emphasis added). That language "sets forth its time limitations in unusually emphatic form." *Brockamp*, 519 U.S. at 350.

As the court of appeals also noted, "Congress explicitly included some exceptions to the deadlines in § 2401(a), but included no such exceptions in § 2401(b). * * * Where Congress 'includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.'" Pet. App. 14-15 (quoting *Russello* v. *United States*, 464 U.S. 16, 23 (1983)); see *Brockamp*, 519 U.S. at 351 ("§ 6511 sets forth explicit exceptions to its basic time limits, and those very specific exceptions do not include 'equitable tolling.'").

Moreover, as the court of appeals explained, the purpose of the FTCA's six-month limitations period is "not

so much to protect [the government's] case-specific interest in timeliness as to achieve a broader system-related goal." Pet. App. 13 (brackets in original) (quoting *John R. Sand & Gravel*, 128 S. Ct. at 753). This Court has long considered the limitations period in Section 2401(b) to be a condition of the government's waiver of sovereign immunity, which the Court would not "extend * * * beyond that which Congress intended." *United States* v. *Kubrick*, 444 U.S. 111, 118 (1979). And as the court noted below, the legislative history of the FTCA supports the conclusion that the limitations period was designed to "ease court congestion and avoid unnecessary litigation, while making it possible for the Government to expedite the fair settlement of tort claims asserted against the United States." Pet. App. 13-14 (quoting S. Rep. No. 1327, 89th Cong., 2d Sess. 2 (1966)). The FTCA's six-month limitations period thus belongs to that category of "more absolute," jurisdictional limitations periods that is not subject to equitable tolling. *John R. Sand & Gravel*, 128 S. Ct. at 753.

3. Petitioner asserts (Pet. 7-14) that this Court's review is warranted to resolve a conflict in authority on the question presented. But none of the cases petitioner cites involves the six-month limitations period here at issue, which governs the filing of claims in federal court after notice of the administrative denial of the claim; all of petitioner's cases instead involve the FTCA's two-year time limit for presenting a claim to the appropriate federal agency in the first instance. See *Rakes* v. *United States*, 442 F.3d 7, 24-25 (1st Cir. 2006) (two-year time limit for presenting tort claim to the relevant agency in 28 U.S.C. 2401(b) is not jurisdictional, and therefore subject to equitable tolling); *Santos ex rel. Beato* v. *United States*, 559 F.3d 189, 197 (3d Cir. 2009) (same);

Hughes v. *United States*, 263 F.3d 272, 278 (3d Cir. 2001) (same); *Perez* v. *United States*, 167 F.3d 913, 917 (5th Cir. 1999) (same); *Glarner* v. *United States*, 30 F.3d 697, 701 (6th Cir. 1994) (same); see also *T.L. ex rel. Ingram* v. *United States*, 443 F.3d 956, 961 (8th Cir. 2006) (holding that two-year limitation period for presentation of claims under Section 2401(b) is jurisdictional, but finding "no inconsistency between viewing compliance with the statute of limitations as a jurisdictional prerequisite and applying the rule of equitable tolling").

Although the FTCA's six-month limitations period and the two-year limitations period are contained in the same section of 28 U.S.C. 2401, they are not identical. The two-year period is applicable to administrative claims, and is principally designed to provide the relevant agency an opportunity to consider and settle the claim before the claimant seeks judicial review. The FTCA imposes no time limits on an agency's disposition of an administrative claim (although a plaintiff may, at his option, file suit if no action is taken within six months). See 28 U.S.C. 2675(a). In contrast, the six-month period is a strict limitation on the filing of a claim in federal court. It is designed, among other things, to serve a systemic interest in judicial efficiency. See *John R. Sand & Gravel*, 128 S. Ct. at 753.

In the government's view, both the two-year and the six-month limitations provisions of 28 U.S.C. 2401(b) are properly considered jurisdictional in nature, and thus are not subject to equitable tolling. But even assuming the FTCA's two-year administrative filing deadline were subject to equitable tolling in appropriate circumstances, it would not follow that its six-month statutory time period for filing complaints in court would also be

subject to equitable tolling. The latter limitations period is short, to ensure particular expedition, and it is triggered by a specific notice denying the administrative claim, which sets a readily identifiable date for the filing of a suit. Indeed the notice to petitioner expressly informed him that suit must be filed within six months. See Pet. App. 3-4.

The decision below, in short, creates no direct conflict that warrants this Court's intervention. But further review of the question concerning the limitations period for filing an administrative claim with the responsible agency at issue in the cases petitioner cites would not, in any event, be warranted at this time. With the exception of the Third Circuit's decision in *Santos*, *supra*, those cases were decided before *John R. Sand & Gravel*, which substantially clarified the circumstances under which equitable tolling is available under limitations provisions governing monetary claims against the United States. At least until other courts have had the opportunity to consider the issue in light of *John R. Sand & Gravel*, this Court's review would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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